

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

NO. 76-7096

76-7096

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

x

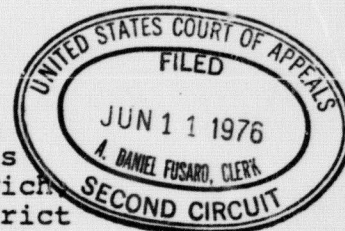
BETH L. NAPRSTEK, a minor, by her mother and next friend, BARBARA C. NAPRSTEK; BARBARA C. NAPRSTEK ON her own behalf; DANE LATHAM, a minor, by his father and next friend, RON LATHAM; RON LATHAM on his own behalf; JOY MASSEY, a minor, by her father and next friend, THOMAS MASSEY; THOMAS MASSEY on his own behalf; JAMES A. ROBINSON, a minor, by his mother and next friend, JUANITA Y. ROBINSON; JANINE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; LYNNE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; JUANITA Y. ROBINSON on her own behalf; all of the foregoing individually and on behalf of all others similarly situated,

No. 76-7096

Plaintiffs-Appellants,

- v -

The CITY OF NORWICH, an incorporated municipality; FREDERICK B. MIRABITO, in his official capacity as Mayor of the City of Norwich; EDWARD J. LEE, in his official capacity as Attorney for the City of Norwich; IRAD S. INGRAHAM, in his official capacity as District Attorney for the County of Chenango; JACK C. SACKETT, in his official capacity as Chief of Police of the City of Norwich,



Defendants-Appellees.

x

On Appeal from the
United States District Court
for the
Northern District of New York

APPENDIX FOR APPELLANT

PAGINATION AS IN ORIGINAL COPY

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ATTORNEYS FOR PLAINTIFFS-
APPELLANTS

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RECEIVED

1976

DATE	NR.	PROCEEDINGS
1975		
Jan. 20	1	Filed complaint-issued summons-original-5 copies & del'vd to Marshal for service
" 22	2	Filed summons served 1/21/75 on all parties
Feb. 3	3	" answer and copy of letter from City of Norwich Attorney to Clifford Forstadt, NY Civil Liberties Union
" 20	4	" Answer of Irad S. Ingrah
May 19	5	Filed request for admission of facts
May 21	6	Filed Notice of Motion and Motion for Summary Judgment, returnable June 9, 1975 at Syracuse
May 21	7	Filed Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment
June 9		Motion for Summary Judgment. Adjourned to September 9, 1975 at Syracuse on Consent
Sept. 9	8	Filed Answering Affidavit of City of Norwich
" 9	9	Filed Answer of City of Norwich
" 9		Motion for Summary Judgment - Decision Reserved
1976		
Jan. 20	10	Filed Opinion of Judge MacMahon (1/14/76)
Jan. 20	11	Filed Judgment dismissing the action as to defendant, The City of Norwich, and as to the remaining defendants this action is closed statistically and placed in suspense & mailed cards re: Judgment to Faith A. Seidenberg, Esq., Clifford Forstadt, Esq., Edward J. Lee, Esq. and Sidney H. Singer, Esq.
Feb. 17	12	Filed Notice of Appeal of plaintiff
Mar. 12		Sent Certified copy of Record on Appeal sent to CCA, 2nd Cir.
Mar. 15	13	Filed copy of civil appeal scheduling order
Mar. 17	14	Filed receipt for papers sent to CCA 2nd cir.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----: Civil Action No.
BETH L. NAPRSTEK, a minor, by her mother and :
next friend, BARBARA C. NAPRSTEK; BARBARA C. : 75-CV-41
NAPRSTEK on her own behalf; DANE LATHAM, a :
minor, by his father and next friend, RON LA- :
THAM; RON LATHAM on his own behalf; JOY MAS- :
SEY, a minor, by her father and next friend, : COMPLAINT FOR DE-
THOMAS MASSEY; THOMAS MASSEY on his own behalf; : CLARATORY AND IN-
JAMES A. ROBINSON, a minor, by his mother and : JUNCTIVE RELIEF
next friend, JUANITA Y. ROBINSON; JANINE ROB- :
INSON, a minor, by her mother and next friend, :
JUANITA Y. ROBINSON; LYNNE ROBINSON, a minor, :
by her mother and next friend, JUANITA Y. ROB- :
INSON; JUANITA Y. ROBINSON on her own behalf; :
all of the foregoing individually and on be- :
half of all others similarly situated, :

Plaintiffs, :

-against- :

The CITY OF NORWICH, an incorporated municipi- :
pality; FREDERICK B. MIRABITO, in his official :
capacity as Mayor of the City of Norwich; :
EDWARD J. LEE, in his official capacity as :
Attorney for the City of Norwich; IRAD S. IN- :
GRAHAM, in his official capacity as District :
Attorney for the County of Chenango; JACK C. :
SACKETT, in his official capacity as Chief of :
Police of the City of Norwich, :

Defendants. :

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ATTORNEYS FOR PLAINTIFFS

PARTIES PLAINTIFF

1. Plaintiff BARBARA C. NAPRSTEK is a citizen of the United States and of the State of New York and resides with her family at 60 Cortland Street, Norwich, New York. She is the mother of two children, aged 11 and 14 years. She brings this action on her own behalf and as mother and next friend of plaintiff BETH L. NAPRSTEK, a minor aged 14 years, as well as on behalf of all others similarly situated. Plaintiff BARBARA C. NAPRSTEK wishes to allow her children under the age of seventeen years to be present, without being accompanied by an adult, in public places of the City of Norwich past the curfew hours designated by the ordinance described herein-after.

2. Plaintiff RON LATHAM is a citizen of the United States, and of the State of New York and resides with his family at 11 Eaton Avenue, Norwich, New York. He is the father of two children, aged 7 and 11 years. He brings this action on his own behalf and as father and next friend of plaintiff DANE LATHAM, a minor aged 11 years, as well as on behalf of all others similarly situated. Plaintiff RON LATHAM wishes to allow his children under the age of seventeen years to be present, without being accompanied by an adult, in public places of the City of Norwich past the curfew hours designated by the ordinance described hereinafter.

3. Plaintiff THOMAS MASSEY is a citizen of the United States and of the State of New York and resides with his family at 6 Sunset Drive, Norwich, New York. He is the father of three children, aged 3, 7 and 13 years. He brings this action on his own behalf and as father and next friend of plaintiff JOY MASSEY, a minor aged 13 years, as well as on behalf of all others similarly situated. Plaintiff THOMAS MASSEY wishes to allow his children under the age of 17 years to be present, without being accompanied by an adult,

in public places of the City of Norwich past the curfew hours designated by the ordinance described hereinafter.

4. Plaintiff JUANITA Y. ROBINSON is a citizen of the United States and of the State of New York and resides with her family at R.D. #1, Norwich, New York. She is the mother of four children, aged 12, 14, 15 and 19 years. She brings this action on her own behalf and as mother and next friend of plaintiff JAMES A. ROBINSON, a minor aged 15 years, plaintiff JANINE ROBINSON, a minor aged 14 years, plaintiff LYNNE ROBINSON, a minor aged 12 years as well as all others similarly situated. Plaintiff JUANITA Y. ROBINSON wishes to allow her children under the age of seventeen years to be present, without being accompanied by an adult, in public places of the City of Norwich past the curfew hours designated by the ordinance described hereinafter.

5. Plaintiff minors are citizens of the United States and of the State of New York and reside with their families in the City of Norwich. They wish to be able to be present in the public places of Norwich past the hours designated by the curfew ordinance described hereinafter.

PARTIES DEFENDANT .

6. Defendant CITY OF NORWICH is a municipality, upon information and belief duly incorporated under the laws of the State of New York, and situated in that State in the County of Chenango.

7. Defendant FREDERICK B. MIRABITO is Mayor of the City of Norwich with the general powers of that office. He is sued here in said official capacity.

8. Defendant EDWARD J. LEE is Attorney for the City of Norwich with the general powers of that office. He is sued here in said official capacity.

9. Defendant IRAD S. INGRAHAM is District Attorney of the County of Chenango, and is the principal executive officer in charge of the enforcement of the laws of the City of Norwich, including the ordinance here in question. He is sued here in his official capacity.

10. Defendant JACK C. SACKETT is the Chief of Police of the City of Norwich and is directly involved with the enforcement of the laws of the City of Norwich, including the ordinance here in question. He is sued here in his official capacity.

JURISDICTION

11. The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1331(a), 1343 and 2201, et seq., this suit being authorized by Title 42 United States Code, Section 1983. This is an action for a declaratory judgment and appropriate equitable relief to prevent further deprivation under color of state law, statute, or ordinance, of rights, privileges and immunities secured to plaintiffs by the Constitution and statutes of the United States, including the right to equal protection and due process of law under the Fourteenth Amendment to the Constitution, and the rights to free speech and assembly under the First and Fourteenth Amendments to the Constitution and under Title 42, United States Code, Section 1983.

NATURE OF ACTION

12. This is a proceeding for an injunction and a declaratory judgement to declare that the enactment and enforcement of the Norwich, New York Code, Chapter 26 [hereinafter "Curfew Ordinance"] a copy of which is attached hereto as Exhibit A, is in violation

of the First, Fifth and Fourteenth Amendments to the Constitution of the United States. This Curfew Ordinance states that all children under the age of seventeen years are forbidden to be upon the streets or in any public places or buildings of the City of Norwich after a certain hour in the evening unless accompanied by an adult person having care and custody of such children, and that the parents of such children violating the conditions of said Curfew Ordinance are subject to monetary fines.

13. This suit constitutes a class action by plaintiffs suing on behalf of themselves and others similarly situated. The rights involved are common and of general interest to the members of the class represented by the plaintiffs, namely, minors under the age of seventeen years and parents of such minors, citizens of the United States and residents and citizens of the State of New York, County of Chenango, City of Norwich, who are denied the right, as to plaintiff minors, to be in public places of the City of Norwich after the specified hour, without the presence of an adult, and as to plaintiff parents, to have their children so present in public places after the designated curfew hour without being subject to a fine and their children subject to arrest. Members of this class are so numerous as to make it impracticable to bring them all before this Court.

PLAINTIFFS' CLAIM

14. Plaintiff minors cannot now under the laws of the City of Norwich be present without an adult on the streets or in any public place of that City after the hours designated by the Curfew Ordinance without being in violation of law.

15. Plaintiff parents are subject to fines when their children under the age of seventeen years are for any reason without an

adult on the streets or in any public place of the City of Norwich after the hours designated by the Curfew Ordinance in question.

16. Plaintiff minors fear arrest if they are present without an adult on the streets of Norwich after the hours designated by the Curfew Ordinance. Plaintiff parents fear that they will be subject to fines and their children arrested if the Curfew Ordinance is violated.

17. Other minor residents of the City of Norwich under the age of seventeen years have been arrested under the terms of the Curfew Ordinance and the parents of such minors have been fined.

18. The aforesaid Curfew Ordinance is unconstitutional in several respects as follows:

(A) It arbitrarily deprives the individual plaintiff minors and all those similarly situated the right to enjoy the use of public streets and places, and deprives plaintiff parents and all those similarly situated the right to allow their children to so enjoy the public places of the City of Norwich, all in violation of the Fourteenth Amendment to the Constitution of the United States;

(B) It fails to provide any standards by which the prohibited conduct may be tested, and is otherwise so vague and overbroad as to render it violative of the Fourteenth Amendment to the Constitution of the United States;

(C) It unreasonably impairs the Constitutional rights of free speech and assembly under the First and Fourteenth Amendments to the Constitution of the United States.

19. Plaintiff minors and all others similarly situated are

threatened with the irreparable injury of an arrest and/or conviction record in the present or future, by reason of the acts herein complained of. Plaintiff parents and all others similarly situated are threatened with irreparable injury in that they may be fined and their children arrested. Plaintiffs have no adequate remedy at law to redress such wrongs and illegal acts.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray:

(1) That the Court declare the Norwich, New York Code, Chapter 26 to be in violation of the First and Fourteenth Amendments to the Constitution of the United States;


(2) That the Court enjoin the defendants FREDERICK B. MIRABITO, EDWARD J. LEE, IRAD S. INGRAHAM, JACK C. SACKETT and the CITY OF NORWICH, its agents, servants, employees and attorneys, and all persons in active concert and participation with the CITY OF NORWICH, during the pendency of this action and permanently, from doing any act which would prevent the plaintiff minors and all others similarly situated from being on the streets and public places of the City of Norwich after the hours specified in the Curfew Ordinance in question and from subjecting plaintiff parents and all others similarly situated to any penalties for the above actions of their children, and from enforcing said Ordinance;

(3) That the Court grant plaintiffs reasonable attorney's fees and costs of bringing this action;

(4) That the Court grant such other and further relief as to the Court may seem proper.

Respectfully submitted,

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1013 State Tower Building
Syracuse, New York 13202
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CLIFFORD FORSTADT
New York Civil Liberties Union
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ATTORNEYS FOR PLAINTIFFS

§ 26-1

CURFEW

§ 26-2

Chapter 26

CURFEW

§ 26-1. Hours of curfew.

§ 26-2. Parents and guardians.

§ 26-3. Violations and penalties.

[HISTORY: Adopted by the Common Council of the City of Norwich 6-10-20 as Ordinance VI of the General Ordinances of the City of Norwich. Amendments noted where applicable.]

§ 26-1. Hours of curfew. [Amended 3-13-44, 5-8-56]

All children under the age of seventeen (17) years are hereby forbidden, to be upon the streets or in any public places or buildings of the City of Norwich, after 11:00 in the evening Sunday, Monday, Tuesday, Wednesday and Thursday, and 12:00 midnight on Friday and Saturday, unless accompanied by the parent, guardian or other adult person having care and custody of the minor.

§ 26-2. Parents and guardians. [Amended 3-13-44, 5-8-56]

All parents or any person having the care and custody of any child under the age of seventeen (17) years are hereby forbidden to permit such child or children to be upon the streets or in any of the public buildings or places of the city after the hours above mentioned unless such child is accompanied by said parent, guardian or other adult person having the care and custody of the minor.

2601

9-25-67

EXHIBIT A

BEST COPY AVAILABLE

§ 26-3

NORWICH CODE.

§ 26-3

§ 26-3. Violations and penalties. [Amended 3-13-44, 5-8-56]

Any parents, guardians or relatives violating the provisions of this section will be punished by a fine of not more than twenty-five dollars (\$25.) for each separate offense, and each violation of this section' shall constitute a separate offense.

1 Editor's Note: Refers to §§ 26-1 and 26-2.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BETH L. NAPRSTEK, a minor, by her mother and next friend, BARBARA C. NAPRSTEK; BARBARA C. NAPRSTEK on her own behalf; DANE LATHAM, a minor, by his father and next friend, RON LATHAM; RON LATHAM on his own behalf; JOY MASSEY, a minor, by her father and next friend, THOMAS MASSEY; THOMAS MASSEY on his own behalf, JAMES A. ROBINSON, a minor, by his mother and next friend, JUANITA Y. ROBINSON; JANINE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; LYNNE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; JUANITA Y. ROBINSON on her own behalf; all of the foregoing individually and on behalf of all others similarly situated,

CIVIL ACTION
FILE NO. 75-CV-41

ANSWER.

Plaintiffs,

against

The CITY OF NORWICH, an incorporated municipality; FREDERICK B. MIRABITO, in his official capacity as Mayor of the City of Norwich; EDWARD J. LEE, in his official capacity as Attorney for the City of Norwich, IRAD S. INGRAHAM, in his official capacity as District Attorney for the County of Chenango; JACK C. SACKETT, in his official capacity as Chief of Policy of the City of Norwich, Defendants.

The defendants, answering the complaint of the plaintiffs herein, allege:

1. Deny having information sufficient to answer the allegations contained in paragraphs "1", "2", "3", "4" and "5" of plaintiffs' complaint and therefor deny same.
2. Admit the allegations contained in paragraphs designated "6", "7", "8", "9" and "10" of plaintiffs complaint.

3. Deny the allegations set forth in paragraphs designated "12", "13", "14", "15", "16", "17", "18" and "19" of the plaintiffs' complaint.

WHEREFORE, the defendant respectfully requests judgment dismissing the complaint herein and that the Court grant the defendant costs in this action, and such other and further relief as to the Court seems just and proper.

Dated: January 22, 1975.

Respectfully submitted,

CITY OF NORWICH
EDWARD J. LEE, ESQ.
City Attorney
35 West Main Street
Norwich, New York 13815

Tel. 607-334-2247

To: Faith A. Seidenberg, Esq.
1013 State Tower Bldg.
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Tel. 315-422-0144
Clifford Forstadt, Esq.
N.Y. Civil Liberties Union
Central New York Chapter
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Syracuse, N.Y. 13202
Tel. 315-471-2821
Attorneys for Plaintiffs

FOR THE NORTHERN DISTRICT OF NEW YORK

BETH L. NAPRSTEK, a minor, by her mother and next friend, BARBARA C. NAPRSTEK; BARBARA C. NAPRSTEK on her own behalf; DANE LATHAM, a minor, by his father and next friend, RON LATHAM; RON LATHAM on his own behalf; JOY MASSEY, a minor, by her father and next friend, THOMAS MASSEY; THOMAS MASSEY on his own behalf, JAMES A. ROBINSON, a minor, by his mother and next friend, JUANITA Y. ROBINSON; JANINE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; LYNNE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; JUANITA Y. ROBINSON on her own behalf; all of the foregoing individually and on behalf of all others similarly situated,

ANSWER

Plaintiffs

against

CIVIL ACTION
FILE NO. 75-CV-41

The CITY OF NORWICH, an incorporated municipality; FREDERICK B. MIRABITO, in his official capacity as Mayor of the City of Norwich; EDWARD J. LEE, in his official capacity as Attorney for the City of Norwich, IRAD S. INGRAHAM, in his official capacity as District Attorney for the County of Chenango; JACK C. SACKETT, in his official capacity as Chief of Police of the City of Norwich,

Defendants

The defendant, IRAD S. INGRAHAM, in his official capacity as District Attorney for the County of Chenango, answering the Complaint of the plaintiffs herein, alleges:

1. Deny having information sufficient to answer the allegations contained in paragraphs "1", "2", "3", "4" and "5" of plaintiffs' Complaint and therefor deny same.
2. Admit the allegations contained in paragraphs designated "6", "7", "8", "9" and "10" of plaintiffs' Complaint.
3. Deny the allegations set forth in paragraphs designated "12", "13", "14", "15", "16", "17", "18" and "19" of the plaintiffs' Complaint.

WHEREFORE, the defendant respectfully requests judgment dismiss-

action, and such other and further relief as to the Court seems just and proper.

Dated: February 17, 1975.

Respectfully submitted,

SIDNEY H. SINGER
Assistant County Attorney
Appearing for
IRAD S. INGRAHAM in his official capacity as District Attorney for the County of Chenango
Office & P.O. Address
36 Genesee Street
Greene, New York 13778

TO: FAITH A. SEIDENBERG, ESQ.
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Tel.No. 315-471-2821

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BETH L. NAPRSTEK et al,
Plaintiffs,
-against-

The CITY OF NORWICH et al,
Defendants.

Civil Action No.
75-CV-41

REQUEST FOR
ADMISSION OF FACTS

Plaintiffs request the defendants within 30 days after service of this request to admit, for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. The ordinance attached to plaintiffs' complaint herein and identified as "Exhibit A" is a true and accurate copy of an ordinance which has been, and continues to be, in full force and effect in the City of Norwich.
2. Persons under the age of seventeen years have been arrested under the terms of the above-referred-to ordinance, and the parents of such persons have been fined.
3. The document attached hereto and entitled "An Ordinance Regulating the Presence and Conduct of Minors, etc." is a true and accurate copy, or a substantially accurate copy, of a proposed ordinance which defendants expect to be enacted by the City of Norwich.

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TO: EDWARD J. LEE, ESQ.
City Attorney
Attorney for Defendants
35 West Main Street
Norwich, New York 13815

SIDNEY H. SINGER, ESQ.
Assistant County Attorney
Attorney for Defendant Irad S. Ingraham
36 Genesee Street
Greene, New York 13778

CITY OF NORWICH
NEW YORK

EDWARD J. LEE
CITY ATTORNEY

TELEPHONE 334-2247

April 24, 1975

Clifford Forstadt, Esq.
New York Civil Liberties Union
Central New York Chapter
310 South Salina Street
Syracuse, New York 13202

Mr. Forstadt, City of Norwich

Dear Cliff:

This is to acknowledge your Request for Admission of Facts received April 21st last.

As I stated to you in my telephone conversation recently, the City would, of course, admit that persons under seventeen years of age have been arrested for curfew violations.

With regards to your request that the City admit that the ordinance attached to plaintiffs' complaint and identified as Exhibit A is a true and accurate copy of an ordinance which has been, and continues to be, in full force and effect in the City of Norwich, is not so.

The ordinance attached to your Request for Admission of Facts is the copy of the ordinance approved by such cases as Thistlewood v. Ocean City, 204 A.2d 688, Peters v. Breier, 322 F. Supp. 1171, and others.

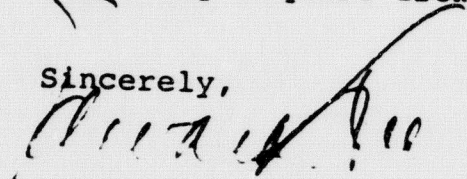
You will recall that I asked you to review this ordinance as one that might be considered for future enactment by the City and I asked if you would obtain the approval of your client, or clients, for this. You will recall that your client, or clients, advised that they do not believe that an ordinance can be drafted that could restrict the youth in any manner as to the hours they might be upon the streets of the City ~~might~~ be constitutional.

- 2 -

I am enclosing the ordinance that is in full force and effect within the City at the present time and it is marked Exhibit A.

If there is anything further you may require from me, will you please advise.

Sincerely,


EDWARD J. LEE

cc: Sidney H. Singer, Esq.

§26-1

CURFEW

§26-2

Chapter 26

CURFEW

§ 26-1. Hours of curfew.

§ 26-2. Parents and guardians.

§ 26-3. Violations and penalties.

(HISTORY: Adopted by the Common Council of the City of Norwich, 6-10-20 as Ordinances VI of the General Ordinances of the City of Norwich. Amendments noted where applicable.)

§ 26-1. Hours of curfew. (Amended 3-13-44, 5-8-56)

All children under the age of seventeen (17) years are hereby forbidden to be upon the streets or in any public places or buildings of the City of Norwich after 11:00 in the evening Sunday, Monday, Tuesday, Wednesday and Thursday, and 12:00 midnight on Friday and Saturday, unless accompanied by the parent, guardian or other adult person having care and custody of the minor.

§ 26-2. Parents and guardians (Amended 3-13-44, 5-8-56)

All parents or any person having the care and custody of any child under the age of seventeen (17) years are hereby forbidden to permit such child or children to be upon the streets or in any of the public buildings or places of the city after the hours above mentioned unless such child is accompanied by said parent, guardian or other adult person having the care and custody of the minor.

2601

20

EXHIBIT A

§ 26-3

NORWICH CODE.

§ 26-3

§ 26-3. Violations and penalties (Amended 3-13-44,
5-8-56)

Any parents, guardians or relatives violating the provisions of this section will be punished by a fine of not more than twenty-five (\$25.) for each separate offense, and each violation of this section shall constitute a separate offense.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BETH L. NAPRSTEK et al.,

Plaintiffs,

-against-

The CITY OF NORWICH et al.,

Defendants.

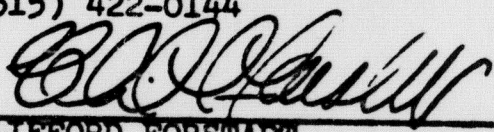
Civil Action No.
75-CV-41

NOTICE OF MOTION FOR
SUMMARY JUDGMENT

SIRS:

PLEASE TAKE NOTICE that upon all the pleadings heretofore had herein, plaintiffs' Request for Admission of Facts, defendants' letter in reply thereto and plaintiffs' Memorandum of Law, the plaintiffs will move this Court at a Stated Term for the hearing of motions, to be held at the United States Post Office Building, Syracuse, New York, on the ninth day of June, 1975, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting a summary judgment in favor of the plaintiffs and against the defendants upon the ground that there is no genuine issue of any material fact and that plaintiffs are entitled to a judgment as a matter of law.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BETH L. NAPRSTEK et al.,
Plaintiffs,

-against-

THE CITY OF NORWICH et al.,
Defendants.

Civil Action No. 75-CV-41

MOTION FOR SUMMARY JUDGMENT

Plaintiffs, through their attorneys, move the Court
as follows:

1. That it enter, pursuant to Rule 56 of the Federal
Rules of Civil Procedure, a summary judgment in plaintiff's
favor for the relief demanded in the complaint on the grounds
that there is no genuine issue as to any material fact and
that plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon:

- (a) Plaintiffs' Complaint;
- (b) Defendants' Answers;
- (c) Plaintiffs' Request for Admission of Facts;
- (d) Defendants' letter in reply thereto;
- (e) Plaintiffs' Memorandum of Law.

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s/ Clifford Forstadt
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ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF NEW YORK

BETH L. NAPRSTEK, a minor, by her mother)
and next friend, BARBARA C. NAPRSTEK;)
BARBARA C. NAPRSTEK on her own behalf;)
DANE LATHAM, a minor, by his father and)
next friend, RON LATHAM; RON LATHAM on)
his own behalf; JOY MASSEY, a minor, by)
her father and next friend, THOMAS MASSEY;)
THOMAS MASSEY on his own behalf, JAMES A.)
ROBINSON, a minor, by his mother and next)
friend, JUANITA Y. ROBINSON; JANINE ROBIN-)
SON, a minor, by her mother and next friend,)
JUANITA Y. ROBINSON; LYNNE ROBINSON, a)
minor, by her mother and next friend, JUANITA)
Y. ROBINSON; JUANITA Y. ROBINSON on her own)
behalf; all of the foregoing individually)
and on behalf of all others similarly)
situated,)
Plaintiffs,)

CIVIL ACTION
FILE NO. 75-CV-41

ANSWERING
AFFIDAVIT

against

The CITY OF NORWICH, an incorporated municipi-)
pality; FREDERICK B. MIRABITO, in his official)
capacity as Mayor of the City of Norwich;)
EDWARD J. LEE, in his official capacity as)
Attorney for the City of Norwich; IRAD S.)
INGRAHAM, in his official capacity as District)
Attorney for the County of Chenango; JACK C.)
SACKETT, in his official capacity as Chief of)
Police of the City of Norwich,)
Defendants.)

STATE OF NEW YORK)
COUNTY OF CHENANGO) SS:
CITY OF NORWICH)

JOSEPH E. O'BRIEN, being duly sworn, deposes and says:

1. That he resides at 9 Rexford Street, Norwich,
New York.

2. That he has served the City of Norwich as City Chamberlain (City Clerk) for a period of more than seventeen years.

3. That this affidavit is made in response to the Motion For Summary Judgment by the Plaintiffs herein.

4. That upon information and belief it is the request of the Plaintiffs that a rarely invoked ordinance, i.e. known as the curfew ordinance of the City of Norwich adopted June 10, 1920 and amended on March 13, 1944 and May 8, 1966, be abolished. That the gist of the complaint by the Plaintiffs is that the Plaintiffs allege that the ordinance is a means of authorizing wide scale discretionary arrests of individuals who cannot be charged with the commission of any other offense (see page 18 line 29, Memorandum of Law for Plaintiffs).

5. Upon information and belief this ordinance has been invoked on but rare occasions and primarily to deter those of tender years from comingling with young adults on the public streets at late hours of the night.

6. Further, as your deponent is informed and believes, the ordinance has served the City since 1920 with but two amendments, and without one complaint of a discretionary arrest.

7. Further, as your affiant is informed and believes, not one of the Plaintiffs has ever been apprehended, arrested or warned in any manner, nor at any time ever been deprived of the use of the public streets and ways and places of the City

of Norwich, and are not true parties in interest.

8. Further, as your deponent is informed and believes, the public has expressed to the City its desire for such an ordinance for the protection of children of the ages of 3, 7, 12, 13, 14 and 15 years of age, children of tender ages, as referred to in the Complaint herein.

9. Further, your deponent is informed that curfew ordinances for minors have been upheld as a reasonable exercise of the police power to protect the peace and good morals of the community so long as the means availed of do not unduly infringe or oppress fundamental rights and the restrictions are sufficiently narrow. *Thistlewood v. Trial Magistrate for Ocean City*, 236 MD. 548, 204 A.2d 688 (App. 1964); *Peters v. Breier*, 322F. Supp. 1171 (E.D. Wis. 1971); in *Re C.*, 105 Cal. Rptr. 113 (App. 1972). Minors constitute a class founded on natural and extrinsic distinctions from adults and legislation peculiarly applicable to minors, when induced by rational considerations, is not invalid as class legislation. *People v. Walton*, 70 Cal. App. 2d 862, 161 P.2d 498 (1945). A court has gone so far as to hold valid a curfew ordinance applicable to adults as well as minors. *City of Portland v. Goodwin*, 187 Ore. 409, 210 P.2d 577 (1949).

Also, an ordinance providing that, with specific exceptions, no person under the age of 17 years shall be on or about public streets during late night hours does not unduly restrict freedom of movement and bears a reasonable and substantial relationship to


the general public welfare. In Re Carpenter, 287 N.E.2d 399 (Ohio App. 1972). Parental responsibility for the curfew violations of their minor children have also been upheld, City of Eastlake v. Ruggiero, 220 N.E.2d 126 (Ohio App. 1966).

WHEREFORE, the deponent respectfully submits that the complaint herein does not set forth against any of the Defendants a case arising under the laws of the Constitution of the United States and therefore should be dismissed.

WHEREFORE, the deponent requests the Action herein against your deponent be dismissed with the costs and disbursements of this action.


JOSEPH E. O'BRIEN

Sworn to before me this 4th
day of September, 1975.


Notary Public, State of New York
My Comm. Expires March 30, 1977
No. 4507673

U.S.District Court
N.D. OF N.Y.
F I L E D

JAN 20 1976

AT,O'CLOCK. . . .M.
J.R. SCULLY, Clerk
UTICA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
BETH L. NAPRSTEK et al., :
Plaintiffs, : Civil Action No.
-against- : 75-CV-41
THE CITY OF NORWICH et al., : OPINION
Defendants. ::
-----X

APPEARANCES:

Faith A. Seidenberg, Esq.,
Syracuse, N. Y., and
Clifford Forstadt, Esq.,
N.Y. Civil Liberties Union,
Central N.Y. Chapter,
Syracuse, N.Y.,
for plaintiffs.

Edward J. Lee, Esq., City
Attorney, Norwich, N.Y.,
and Singer & Singer
(Sidney H. Singer, Esq.,
of counsel), Greene, N. Y.,
for defendants.

MacMAHON, District Judge.

Plaintiffs move for summary judgment, pursuant to Rule 65, Fed.R.Civ.P., in this action to declare

* Of the Southern District of New York, sitting by designation.

unconstitutional and to enjoin further enforcement of a curfew ordinance of the City of Norwich, which prohibits all children under the age of 17 from being on the streets or in any public place past a certain hour in the evening.¹ Invoking the Civil Rights Act, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343, the ordinance is challenged as a violation of the First and Fourteenth Amendments. Plaintiffs bring this action on their own behalf as parents and on behalf of their children, minors under the age of 17, as well as all others similarly situated.

The ordinance forbids all children under the age of 17 from being on the streets or in a public place in the evening past 12:00 Midnight on Friday or Saturday, and past 11:00 P.M. on other nights, unless they are accompanied by a parent, guardian or other adult person having care and custody of the minor. Parents or persons having custody are forbidden to permit such children from being on the streets past the designated hour. Any parent, guardian or relative who violates the ordinance is subject to a fine.

As a preliminary matter, we must dismiss this action as against defendant City of Norwich, for it is well established that a municipality is not a "person" within the meaning of 42 U.S.C. § 1983.²

We must next consider whether the named plaintiffs have standing to bring this action, and this depends on whether they have shown a personal stake in the outcome of this suit sufficient to assure the concrete adverseness necessary to a federal action.³ Defendants contend that the named plaintiffs lack the actual or threatened injury necessary to give them standing⁴ since the ordinance has never been enforced against them. Plaintiffs contend that the ordinance proscribes the conduct which they wish to pursue and, therefore, interferes directly with their enjoyment of a constitutionally guaranteed right, thereby causing them to have suffered and to continue to suffer injury.

Although a mere allegation of "subjective chill" on constitutional rights does not satisfy the standing requirement,⁵ it is not necessary for a petitioner to expose himself to arrest or prosecution in order to bring suit in a federal court.⁶ A plaintiff may challenge the

constitutionality of an ordinance, although he has not been arrested or threatened with arrest, as long as there is no question that the ordinance prohibits plaintiff's intended conduct and the ordinance has been applied to parties in circumstances identical to that of the plaintiff.⁷

There is no questions as to the application of the curfew ordinance. The prohibition is simple; children under the age of 17 cannot be on the streets past a certain hour. Plaintiff minors wish to be on the streets past that time, and plaintiff parents want to allow them that freedom. To deny standing would require plaintiffs to violate the law in order to bring suit. Moreover, plaintiffs claim that obedience to the law requires them to give up a right guaranteed by the constitution. Therefore, they have suffered a direct and immediate injury. Finally, the ordinance was enacted in 1920 and has been applied in original or amended form since that time. Plaintiffs have standing to bring this suit.

Although this court has given complete consideration to plaintiffs' constitutional claims, the

vagueness of the curfew ordinance requires that we abstain from adjudication of plaintiffs' claims. Abstention is a doctrine that allows a federal court to defer adjudication of an action within its jurisdiction when the meaning of a state statute is uncertain and a construction by a state tribunal would modify the constitutional issues presented.⁸ The doctrine serves the interests of avoiding premature or unnecessary decisions, as well as leaving to the state resolution of unsettled questions of state law and preventing needless conflict between the state and the federal judiciary.

Although purporting to define the period within which a minor's use of the streets is restricted, the ordinance fails to include the time when the curfew is terminated. Section 26-1 states only that the curfew is to begin at 11:00 P.M. or midnight. It does not specify when the curfew is to end. All minors may, therefore, be in continuing violation of the ordinance regardless of what time they are about the streets and public places of Norwich. Alternatively, if a midnight termination time is to be inferred from the use of the word "evening," the ordinance may be susceptible to violation only

between 11:00 P.M. and midnight on Sunday, Monday, Tuesday, Wednesday and Thursday nights. Given the importance of the constitutional issues raised, deference to the state for its interpretation of this ambiguous ordinance is warranted.⁹

In light of all the circumstances, it appears that the interests of judicial economy and of the litigants would best be served by abstaining from further proceedings in this action until there has been an authoritative and definitive construction of the challenged ordinance by a state tribunal.

Accordingly, this action is dismissed as to defendant, The City of NORwich, and as to the remaining defendants this action is closed statistically and placed in suspense. The Clerk is directed to submit a JS-6 Form to the Administrative Office of the United States Courts.

So ordered.

Dated: New York, N. Y.

January 14, 1976

s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

FOOTNOTES

1. Curfew Ordinance, Norwich, New York Code, Chapter 26, Provides:

"§ 26-1. Hours of curfew.

All children under the age of seventeen (17) years are hereby forbidden to be upon the streets or in any public places or buildings of the City of Norwich, after 11:00 in the evening Sunday, Monday, Tuesday, Wednesday and Thursday, and 12:00 midnight of Friday and Saturday, unless accompanied by the parent, guardian or other adult person having care and custody of the minor.

§ 26-2. Parents and guardians.

All parents or any person having the care and custody of any child under the age of seventeen (17) years are hereby forbidden to permit such child or children to be upon the streets or in any of the public buildings or places of the city after the hours above mentioned unless such child is accompanied by said parent, guardian or other adult person having the care and custody of the minor.

§ 26-3. Violations and penalties.

Any parents, guardians or relatives violating the provisions of this section will be punished by a fine of not more than twenty-five dollars (\$25) for each separate offense, and each violation of this section shall constitute a separate offense."

2. City of Kenosha v. Bruno, 412 U.S. 507 (1973).
3. Baker v. Carr, 369 U.S. 186, 204 (1962).
4. Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973).
5. Laird v. Tatum, 408 U.S. 1 (1972).
6. Steffel v. Thompson, 415 U.S. 452 (1974); Evers v. Dwyer, 358 U.S. 202 (1958).
7. Doran v. Salem Inn, Inc., 43 U.S.L.W. 5039 (U.S. June 30, 1975); Salem Inn, Inc. v. Frank, Docket No. 75-7101 (2d Cir., Aug. 28, 1975); Bykofsky v. Borough of Middletown, 389 F. Supp. 839 (M.D. Pa. 1975).
8. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Railroad Comm'n v. Pullman, 312 U.S. 496 (1941).
9. Harrison v. NAACP, 360 U.S. 167, 178 (1959).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BETH L. NAPRSTEK, a minor, by her mother and
next friend, BARBARA C. NAPRSTEK; et al.,

Plaintiffs,

- v -

The CITY OF NORWICH, an incorporated municipi-
pality; FREDERICK B. MIRABITO, et al.,

Defendants.

CIVIL ACTION
75-CV-41

NOTICE OF APPEAL

S I R S :

PLEASE TAKE NOTICE that the plaintiffs above named hereby appeal to the United States Court of Appeals for the Second Circuit, at Foley Square, New York, N. Y., from the decision of the Honorable Lloyd F. MacMahon, United States District Judge for the Northern District of New York, dated January 14, 1976, which dismisses the action as to defendants City of Norwich, et al., and abstains from any further proceedings; and from the decision to close this action statiscally and place it in suspense.

Dated: February 3, 1976
Syracuse, New York